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Supreme Court, U.S.
FILED
SEP 7 1993
OFFICE OF THE CLERK

No. 92-1957

In the Supreme Court of the United States

OCTOBER TERM, 1993

TORRENCE GIPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether petitioner was a previously convicted felon for purposes of 18 U.S.C. 922(g)(1) and 924(e)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 985 F.2d 412. The opinion of the district court (Pet. App. 7a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1993. The petition for a writ of certiorari was filed on May 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of North Dakota, petitioner was convicted of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 15 years' imprisonment. The court of appeals affirmed.

1. In 1978 and 1979, petitioner was convicted of three felony offenses in Illinois state court.[1] Pet. App. 4a, 8a; Gov't C.A. Br. 7. After serving a term of imprisonment, petitioner was paroled in 1981. Gov't Supp. C.A. Br. Add. 1. On March 21, 1984, the Illinois Prisoner Review Board issued petitioner a document captioned "Order for Discharge." *Ibid.* The order stated that petitioner was "finally discharged" from his state convictions and that he was "relieve[d] * * * of all sentence obligation as described herein." *Ibid.* In addition, the order advised petitioner that "[y]our rights to vote and administer estates are regained, though you may be required to show this document to the registration authority." *Ibid.*

2. On August 7, 1991, a federal grand jury in the District of North Dakota returned an indictment charging petitioner with one count of making a false statement in connection with the acquisition of a firearm, in violation of 18 U.S.C. 922(a)(6) (Count 1), and one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1) (Count 2). Indictment 1-3. Count 2 alleged that petitioner had three previous state robbery convictions, thus subjecting him to a minimum term of 15 years' imprisonment under 18 U.S.C.

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[1] On March 13, 1978, petitioner was convicted of a robbery committed on June 8, 1976, and of an attempted robbery committed on June 21, 1976. On June 27, 1979, he was convicted of an armed robbery committed on October 1, 1978. Gov't C.A. Br. 7.

924(e)(1).[2] Indictment 3. After trial, the jury convicted petitioner on Count 2 of the indictment, and the district court sentenced him to the fifteen-year term of imprisonment required by Section 924(e)(1). Pet. App. 1a-2a.

3. On appeal, petitioner argued that his Illinois robbery convictions could not properly be considered as prior convictions for purposes of Sections 922(g)(1) or 924(e)(1). Relying on the definition of "crime punishable by imprisonment for a term exceeding one year" contained in 18 U.S.C. 921(a)(20), petitioner argued that the robbery convictions were not convictions for purposes of the federal firearms laws, because his civil rights had been restored under Illinois law upon his discharge from the state convictions.[3] Pet. App. 2a. The court of appeals

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[2] The sentence enhancement provision of 18 U.S.C. 924(e)(1) applies to previously convicted felons who possess or receive a firearm in violation of 18 U.S.C. 922(g)(1). Section 924(e)(1) provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years * * *.

[3] Section 922(g)(1) of Title 18 forbids possession of firearms by "any person * * * who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(g)(1); see also 18 U.S.C. 924(e)(2)(B)(i) (defining "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year * * * that * * * has as an element the use, attempted use, or threatened use of physical force against the person of another").

In pertinent part, Section 921(a)(20), defines "crime punishable by imprisonment for a term exceeding one year" as follows (18 U.S.C. 921(a)(20)):

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has

remanded the case to the district court for consideration of petitioner's challenge to his conviction and sentence. Pet. App. 13a-14a.

On remand, the district court rejected petitioner's claim that his Illinois robbery convictions did not qualify as prior convictions for purposes of the federal firearms statutes. Pet. App. 7a-11a. The court noted that the Illinois restoration of rights statute, on which petitioner relied, "discusses the restoration of a discharged felon's right to hold public office and to vote," but makes "[n]o mention * * * of the specific right to possess a firearm." Pet. App. 11a. Petitioner also relied on an Illinois statute which, at the time of his discharge from his state convictions, permitted ex-felons to apply for a "firearm owner's identification card" after a five-year waiting period. See Pet. App. 10a (citing Ill. Ann. Stat. ch. 38, para. 83-4 (Smith-Hurd 1977) (recodified at Ill. Comp. Stat. Ann. ch. 430 para. 65/4 (Smith-Hurd 1993)). The district court noted that "[t]here is nothing in the record to indicate that [petitioner] made application for the identification card, that an application was approved, or even that possession of a firearm owner's identification card is tantamount to the restoration of the specific civil right allowing possession of [a] firearm." Pet. App. 10a-11a. The court accordingly concluded that "the State of Illinois has not restored [petitioner's] civil right to possess a firearm within the meaning of" Section 921(a)(20). Pet. App. 11a.

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been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Petitioner also argued that an Illinois statute prohibiting possession of firearms by convicted felons, which had become effective several months after petitioner was discharged from his prior convictions, could not constitutionally be applied to validate his prior convictions. See Pet. App. 8a. The district court rejected that claim as well, explaining that because it had concluded that petitioner's right to possess a firearm had not been restored, his ex post facto claim was "irrelevant." Pet. App. 8a-9a.

4. The court of appeals affirmed. Pet. App. 1a-7a. The court explained that "for a person to have his civil rights restored by a state for the purposes of section 921(a)(20), the relevant state must actually have restored the felon's right to possess firearms." Pet. App. 4a-5a. The court of appeals agreed with the district court that the Illinois restoration of rights statute "restores only the right to vote and to hold office, but not the right to possess or carry firearms," Pet. App. 6a (citing *United States* v. *Erwin*, 902 F.2d 510 (7th Cir.), cert. denied, 498 U.S. 859 (1990)), and that petitioner could not claim that his right to possess firearms had been restored by the statute permitting ex-felons to apply for a firearm owner's identification card after a five-year waiting period. Pet. App. 5a-7a.

ARGUMENT

Petitioner contends (Pet. 6-21) that his three robbery convictions in Illinois did not come within the definition of a "crime punishable by a term of imprisonment exceeding one year" under 18 U.S.C. 921(a)(20), and thus could not be used as the basis for a conviction under 18 U.S.C. 922(g)(1) or to enhance his sentence under 18 U.S.C. 924(e)(1).

1. Petitioner contends that his prior convictions could not be counted for purposes of Section 921(a)(20)

because his order of discharge from those convictions restored his civil rights under Illinois law without expressly forbidding him from possessing firearms. That contention is without merit.

When petitioner's convictions were discharged, Illinois law precluded the restoration of petitioner's right to possess a firearm. See Ill. Ann. Stat. ch. 38, para. 24-3.1(a)(3) (Smith-Hurd 1961) (prohibiting possession of firearms by any person who "has been convicted of a felony under the laws of this or any other jurisdiction within 5 years from release from the penitentiary or within 5 years of conviction if penitentiary sentence has not been imposed") (repealed 1988).[4] Moreover, it is plain under Ill. Ann. Stat. ch. 38, para. 83-4 (Smith-Hurd 1977), which was in effect at the time of petitioner's discharge from his state convictions, that petitioner was categorically ineligible to own firearms as a matter of state law for five years. Thus, the discharge petitioner received could not, as a matter of Illinois state law, have restored his right to possess firearms. Accordingly, under the terms of Section 921(a)(20), petitioner's prior convictions could be counted because his restoration of rights was subject to the express condition that he "may not * * * possess * * * firearms."

Petitioner nonetheless argues (Pet. 6-10) that Section 921(a)(20) permits courts to consider only the document evidencing his restoration of rights. That narrow con-

[4] Possession of firearms in violation of this statute was a misdemeanor. See Ill. Ann. Stat. ch. 38, para. 24-3.1(b) (Smith-Hurd 1961). Ill. P.A. 83-1056 (July 1, 1984), which added a provision making possession of firearms by convicted felons a felony, see Ill. Ann. Stat. ch. 38, para. 24-1.1 (Smith-Hurd 1961) (recodified at Ill. Comp. Stat. Ann. ch. 720, para. 5/24-1.1 (Smith-Hurd 1993)), and also amended Paragraph 24-3.1 to delete the provision limiting the restriction on felons' possession of firearms to five years after the date of conviction or release from incarceration.

struction of Section 921(a)(20) is inconsistent, however, with the statute's purpose of removing "the disabling effect of a felony conviction" only "when the state of conviction has made certain determinations, embodied in state law, regarding a released felon's civil rights and firearms privileges." *United States* v. *Cassidy*, 899 F.2d 543, 546 (6th Cir. 1990); see also *United States* v. *McLean*, 904 F.2d 216, 218 (4th Cir.), cert. denied, 498 U.S. 875 (1990); *United States* v. *Erwin*, 902 F.2d 510, 512 (7th Cir.) (Section 921(a)(20) "is designed to require federal rules to track state law"), cert. denied, 498 U.S. 859 (1990).

Contrary to petitioner's argument (Pet. 7), the language of Section 921(a)(20) does not mandate exclusive reference to the document evidencing the restoration of rights. Rather, the statute requires examination of the legal event itself. The scope of a convicted felon's restoration of rights, including its effect on his state-law firearms disability, is the true reflection of state law. There is nothing in the federal statute to indicate that Congress intended to restrict the state law inquiry to the document evidencing the restoration of rights, even when that restricted inquiry would result in an inaccurate characterization of the State's treatment of the defendant's state law offense. The courts of appeals have thus consistently held that Section 921(a)(20) requires a court to look to the "whole of state law" to determine the scope of an ex-felon's restoration of rights. See *United States* v. *Cassidy*, 899 F.2d 543 at 548 ("A narrow interpretation requiring that we look only to the document, if any, evidencing a restoration of rights, would frustrate the intent of Congress that we look to the whole of state law, including state law concerning a convicted felon's firearms privileges."); accord *United States* v. *Burns*, 934 F.2d 1157, 1160-1161 (10th Cir. 1991), cert. denied, 112 S. Ct. 1246 (1992); *United States* v. *Gomez*, 911 F.2d 219,

220 (9th Cir. 1990); *United States* v. *McLean*, 904 F.2d at 218.[5]

Petitioner also contends (Pet. 10-19) that the Illinois legislature's subsequent enactment of a statute making possession of firearms by a previously convicted felon a felony could not "rejuvenate" his robbery convictions after his civil rights had previously been restored. As we have explained, however, Illinois law already prohibited ex-felons from possessing firearms at the time petitioner was discharged from his robbery convictions. Thus, petitioner's statement (Pet. 10) that there was "no such ban * * * at the time of the restoration of [petitioner's] civil rights" is simply mistaken.

2. Petitioner contends (Pet. 14-18) that the decision in this case conflicts with the decisions in *United States* v. *Cardwell*, 967 F.2d 1349 (9th Cir. 1992); *United States* v. *Haynes*, 961 F.2d 50 (4th Cir. 1992); and *United States* v. *Dahms*, 938 F.2d 131 (9th Cir. 1991). That contention is without merit.

In each of the cases on which petitioner relies, the court held that an ex-felon's prior conviction could not be counted for purposes of the federal firearms statutes because the defendant was not barred by state law from possessing firearms at the time his civil rights were re-

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[5] Petitioner mistakenly relies (Pet. 19-20) on *United States* v. *Erwin*, 902 F.2d at 512-513, in which the court speculated about the possible application of the "expressly provides" language in the last clause of Section 921(a)(20) to a situation in which a convicted felon was misled by receipt of a restoration certificate "implying * * * that *all* civil rights have been restored." As the court noted, however, its discussion of that issue was dicta. 902 F.2d at 512. In any event, the order discharging petitioner from his convictions in this case did not mislead petitioner by implying that all of his civil rights had been restored; it merely stated that petitioner's "rights to vote and administer estates [were] regained." Gov't Supp. C.A. Br. Add. 1.

stored, or because state law did not prohibit the defendant from possessing the particular types of firearms at issue. See *United States* v. *Cardwell*, 967 F.2d at 1350 (defendant's possession of shotgun and rifle was legal under state law when his civil rights were restored); *United States* v. *Haynes*, 961 F.2d at 52-53 (state law did not prohibit possession of firearms by convicted felons when defendant's civil rights were restored); *United States* v. *Dahms*, 938 F.2d at 135 (although state law barred defendant's possession of pistols, state law did not restrict defendant's right to possess shotgun). In *Cardwell* and *Haynes*, the courts concluded that the scope of a defendant's restoration of rights must be determined as of the time his rights were restored. *Cardwell*, 967 F.2d at 1350-1351; *Haynes*, 981 F.2d at 52-53. Although the courts in those cases therefore held that later-enacted statutes outlawing possession of firearms by convicted felons could not be applied to ex-felons whose rights had previously been fully restored, this case does not present a similar situation. Because Illinois law prohibited petitioner from possessing any firearms at the time his civil rights were restored, there is no conflict between the decision in this case and the decisions on which petitioner relies.[6]

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[6] Petitioner also contends (Pet. 13-14, 19) that the Eighth Circuit's decision in this case "abandoned" that court's decision in *United States* v. *Traxel*, 914 F.2d 119 (8th Cir. 1990). Even if that were true, such an intra-circuit conflict would not warrant resolution by this Court. In fact, however, the reasoning of *Traxel* is consistent with the decision below. The *Traxel* court held that a Minnesota statute enacted in 1975 to limit a convicted felon's right to possess a pistol did not apply to a defendant whose civil rights had been restored in 1973 after a 1969 conviction. The court reasoned that at the time of the 1973 restoration of rights, Minnesota law imposed no restriction on the defendant's right to possess firearms. For that reason, the court held that the defendant's 1969 conviction could not be considered under 18 U.S.C. 921(a)(20). 914

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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F.2d at 124-125. In considering the effect of the 1975 Minnesota law on the defendant's 1977 and 1978 convictions, however, the court observed that the statute:

> provides evidence that since 1975, those civil rights restored to convicted felons by [state law] exclude the right to possess firearms. Because the right to possess firearms is the civil right with which section 921(a)(20) is concerned, Minnesota felony convictions for which civil rights were restored after [1975] do not constitute convictions "for which a person has had civil rights restored" within the meaning of section 921(a)(20).

914 F.2d at 124. The analysis in *Traxel* thus supports the decision of the court below.